

DATE: December 8, 1998

CASE NO: 98-STA-0013

In the Matter of

FRANCISCO BABILONIA

Complainant

v.

BROOKS ARMORED CAR SERVICES, INC.

Respondent

ORDER APPROVING SETTLEMENT AND
APPROVING WITHDRAWAL OF COMPLAINT

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105. A "General Release" was executed by Complainant and Respondent on October 29, 1998, respectively, and was submitted for my review and approval on November 24, 1998. The General Release provides that Complainant withdraws the complaint herein.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. § 5851(b)(2)(A) (1988). *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.3d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

The General Release provides that Complainant releases Respondent from claims arising under the STA as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the STA. *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2.

The General Release states that Respondent will pay Complainant a specified amount.

The General Release contains a confidentiality provision which provides, *inter alia*, that "It is further understood and agreed that FRANCISCO BABILONIA, his attorneys or other representatives will not, in any way, publicize or communicate information regarding the facts of this case or the terms of this settlement agreement to newspapers, magazines, radio or television,

or to any legal journal or publication of any sort. FRANCISCO BABILONIA and his attorney also agree that if they are asked about the facts of the case or the terms and conditions of this settlement by any form of the media, they will decline to comment. It is further agreed that the terms of this settlement agreement will be held in strict confidence and FRANCISCO BABILONIA, his attorney and other representatives will not discuss the terms of this settlement with anyone unless they are required to do so by a court of law or are presenting testimony under oath.”

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA) “requires agencies to disclose requested documents unless they are exempt from disclosure . . .” *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspections Services*, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. *see also Pulmlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 9, 10, Sec. Final order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, June 28, 1993, slip op. at 2 n.1 (parties’ submissions become part of the record and are subject to FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, June 25, 1993, slip op. at 2.

The records in the instant case are agency records which must be made available for public inspection and copying under FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA requests have been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. Further it would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestor from denial of such request , and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70 (1995).

The confidentiality provisions of the General Release could also constitute a “gag provision” that is unacceptable as being against public policy if it precludes Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret this language (quoted above) as not preventing Complainant either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, state or federal authorities about suspected violations of law involving Respondent. Therefore, the General Release does not contain an invalid gag provision. *Thorton v. Burlington Environmental and Phillip Environmental*, 94-TSC-2, Sec. Final Order Approving

Settlement and Dismissing Complaint, Mar. 17, 1995.

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7, ARB Case Nos. 96-109, 07-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. As this is the only settlement documentation submitted to me, I find that there were no other settlement agreements arising from the same factual circumstances which formed the basis for this claim.

Finally, I note that the agreement makes no reference to a fee for Complainant's attorney. Thus, it appears that Complainant will pay his attorney's fee, if any. The Secretary has held:

Where attorney's fees are incorporated in an agreement, the ALJ does not approve the fee amount. If, however, the parties submit an agreement providing for Complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by Complainant is faire, adequate and reasonable.

Tinsley v. 179 South Street Venture, 89 CAA-3, Sec. Order of Remand, Aug. 3, 1989, slip op. at 3. In more recent decisions, the Secretary has held that it is not necessary for a settlement to specify the amount of an attorney's fee. *Guity v. Tennessee Valley Authority*, 90-ERA-10, ARB Case No. 96-180, Aug. 28, 1996, *Klock v. Tennessee Valley Authority*, 95-ERA-20, OAA May 1, 1996. Therefore, there is no requirement that the settlement agreement in the instant case include the amount of the attorney's fee for which the Complainant is responsible.

ORDER

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I **APPROVE** the agreement and **APPROVE THE WITHDRAWAL OF THE COMPLAINT WITH PREJUDICE.**

PAUL H. TEITLER
Administrative Law Judge